

1 Cristina C. Arguedas (CalBN 87787) Allen J. Ruby (CalBN 47109)
2 Email: arguedas@achlaw.com Email: allen.ruby@skadden.com
3 Ted W. Cassman (CalBN 98932) Jack P. DiCanio (CalBN 138782)
4 Email: cassman@achlaw.com Email: jack.dicarlo@skadden.com
5 Raphael M. Goldman (CalBN 229261) Patrick Hammon (CalBN 255047)
6 Email: goldman@achlaw.com Email: patrick.hammon@skadden.com
7 ARGUEDAS, CASSMAN & HEADLEY, LLP SKADDEN, ARPS, SLATE, MEAGHER
8 803 Hearst Avenue & FLOM LLP
Berkeley, CA 94710 525 University Avenue, Suite 1100
Telephone: (510) 845-3000 Palo Alto, CA 94301
Facsimile: (510) 845-3003 Telephone: (650) 470-4500
Facsimile: (650) 470-4570

9 *Counsel for FedEx Corporation,*
10 *Federal Express Corporation and*
FedEx Corporate Services, Inc.

11 UNITED STATES DISTRICT COURT
12 FOR THE NORTHERN DISTRICT OF CALIFORNIA
13 SAN FRANCISCO DIVISION

14) **No. CR 14-380 (CRB)**
15 UNITED STATES OF AMERICA,)
16 Plaintiff,) **FEDEX DEFENDANTS' PRETRIAL**
17) **CONFERENCE STATEMENT**
18 v.) Trial Date: June 6, 2016
19 FEDEX CORPORATION, FEDERAL) Time: 8:30 a.m.
20 EXPRESS CORPORATION, and FEDEX) Courtroom 8, Hon. Charles R. Breyer
21 CORPORATE SERVICES, INC.,)
22 Defendants.)
23
24
25
26
27
28

1 FedEx Corporation, Federal Express Corporation and FedEx Corporate Services,
2 Inc. (collectively, "FedEx") hereby submit a Pretrial Conference Statement.
3

4 **I. INTRODUCTION**

5 FedEx did not conspire with the charged online pharmacies. Nor did FedEx
6 deliver medications knowing and intending that the medications were prescribed outside
7 the usual course of professional practice and not for a legitimate medical purpose.
8 FedEx transported packages tendered by pharmacies that were licensed by state
9 governments and registered by the United States Drug Enforcement Agency, just as it
10 transported packages for every other member of the public that sought to use its
11 carriage services.

12 The gravamen of the charged offenses was committed by doctors in the context
13 of their relationships, or lack of relationships, with their patients. FedEx did not
14 participate in those alleged crimes. FedEx did not know which pharmacies and
15 websites were distributing medications by means of a prescription issued by a physician
16 outside the usual course of professional practice and not for a legitimate medical
17 purpose, and which were not. FedEx assisted law enforcement in the investigation of
18 online pharmacy entities, including members of both conspiracies alleged in the
19 indictment, with the intent and understanding that law enforcement would determine the
20 legality of their operations. FedEx was confident that continuing to service its
21 customers pending law enforcement investigations of the online pharmacy industry was
22 the appropriate, if not required, course.

23 As to the so-called Chhabra-Smoley and Superior Drugs organizations, in
24 addition to the fact that FedEx did not enter into any conspiracy, the evidence will show
25 that the charged conspiracies did not exist within the applicable statute of limitations
26 and that, as to each charged conspiracy, there was not a single over-arching
27 conspiratorial agreement but rather multiple agreements.

1 **II. MATTERS ADDRESSED PURSUANT TO LOCAL RULE 17.1-1**

2 Pursuant to Criminal Local Rule 17.1-1, FedEx addresses the following matters.

3 **A. Statements of Witnesses**

4 FedEx has produced to the government all statements of defense witnesses that
 5 are in FedEx's possession and that relate to the anticipated subject matter of the
 6 witnesses' testimony. See Fed. R. Crim. P. 26.2. FedEx may produce additional
 7 witness statements in the event FedEx finds it necessary to amend or supplement its
 8 witness list. See Part II.I, *infra*.

9 **B. Use of Grand Jury Testimony**

10 A number of witnesses who testified before a grand jury in this district will be
 11 called by one party or the other to testify at trial. FedEx requests that the Court unseal
 12 such witnesses' grand jury testimony so that it may be employed, if necessary, for
 13 refreshing witnesses' recollections, impeachment, and other such purposes.

14 **C. Disclosure of Exculpatory Evidence to the Defense**

15 On April 4, 2016, defense counsel sent the government a letter requesting that
 16 the prosecution provide, with respect to witnesses included on the government's
 17 witness list, all exculpatory and other relevant information to which FedEx is entitled
 18 under *Brady v. Maryland*, 373 U.S. 83 (1963), *Giglio v. United States*, 405 U.S. 150
 19 (1972), the Jencks Act, 18 U.S.C. § 3500, *United States v. Henthorn*, 931 F.2d 29 (9th
 20 Cir. 1991), and related authorities. FedEx counsel's letter requested a response by May
 21 2, 2016. On May 5, 2016, counsel sent another letter seeking a response from the
 22 government. On May 9, 2016, the prosecution responded that it had reviewed our
 23 letters and is "aware of [its] obligations under *Brady* and Jencks and will produce
 24 information as necessary and appropriate."

25 **D. Stipulation of Facts**

26 At the April 20, 2016 hearing, the Court ordered the prosecution to present the
 27 defense with proposed fact stipulations; the Court set a deadline of May 12, 2016 for the

1 proposals. Dkt. 258 (4/20/2016 Hrg Tx) at 30-33. As of the time of this filing, we have
2 not yet received the proposed stipulations.

3 **E. Appointment of Interpreters**

4 FedEx is not aware of any necessity for the appointment of interpreters in this
5 matter.

6 **F. Dismissal of Counts**

7 The Court previously dismissed Counts One through Twelve and Fourteen and
8 Fifteen of the superseding indictment as against defendants FedEx Corporation and
9 FedEx Corporate Services, Inc. See Dkt. 231.

10 FedEx's motions in limine, which are pending before the Court, would if granted
11 have the effect of further eliminating certain issues at trial.

12 **G. Joinder**

13 FedEx is aware of no issues relating to joinder.

14 **H. Identification of Informants, Use of Line-Ups, Evidence of Prior
15 Convictions, Etc.**

16 Some of the witnesses included on the government's witness list have suffered
17 prior felony convictions. If one or more of the witnesses are called to testify, the
18 defense may use their prior convictions to impeach their credibility pursuant to Federal
19 Rule of Evidence 609(a)(1).

20 **I. Pretrial Exchange of Witness Lists**

21 The parties have filed witness lists. See Dkt. 232 & 233. At the April 20, 2016
22 hearing, the government stated that it would provide an amended list on today's date,
23 May 12, 2016. See Dkt. 258 (4/20/2016 Hrg Tx) at 30.

24 FedEx reserves the right to amend or supplement its list in response to the
25 government's amended witness list, as trial preparation continues, and/or as the
26 government's case-in-chief proceeds.

1 **J. Pretrial Exchange of Documents and Exhibits**

2 The parties have filed exhibit lists. See Dkt. 256 & 259. FedEx may update or
3 supplement its list as the defense further reviews the evidence, as new evidence is
4 discovered, and as the government's case proceeds.

5 FedEx notes that the government's exhibit list, Dkt. 256, references various
6 diagrams, charts and summaries that have not yet been provided to the defense.
7 FedEx requests that the government be required to provide FedEx with copies of such
8 summary exhibits by May 26, 2016.

9 FedEx expects that defense counsel will employ demonstrative graphics during
10 opening statement to the jury. FedEx will disclose the graphics to the prosecution after
11 the government has completed its own opening statement.

12 **K. Pretrial Resolution of Objections to Evidence and Testimony**

13 In FedEx's separately-filed motions in limine, the defense raised objections to the
14 admission of various exhibits and testimony.

15 **L. Controverted Points of Law**

16 The parties' motions in limine, and the oppositions thereto, raise numerous
17 controverted points of law that are ripe for the Court's resolution.

18 In Part II.N, *supra*, FedEx proposes several instructions related to legal issues
19 that the defense believes should be resolved before the trial begins.

20 **M. Scheduling of the Trial and Witness Testimony**

21 This trial will be long and complicated; there may be more than one hundred
22 witnesses. FedEx believes that both parties would benefit from an arrangement
23 concerning the scheduling of witnesses. Among other issues, each party intends to call
24 witnesses who are, in some senses, within the "jurisdiction" of the opposing party — the
25 government intends to call FedEx employees, and FedEx may call federal law
26 enforcement witnesses, see Dkt. 232 & 233 — and virtually all of the witnesses reside
27 outside this district.

FedEx proposes that each party be required to make a good-faith effort to provide opposing counsel with one week notice before any witness is called to testify. Further, to the extent a witness currently or formerly employed by FedEx is called by the government, or a witness employed by the federal government is called by FedEx, the employer will arrange for the witness to travel to San Francisco. (The calling party would be responsible for paying the customary travel expenses and witness fees.)

Additionally, as discussed in FedEx's opposition to the government's motions in limine, Dkt. 260 at 37-38, it appears that the government plans to introduce into evidence a number of FedEx emails and other writings without calling the declarant as a witness. In many cases, this will require FedEx to call the declarant to testify about the writing and his or her state of mind when he or she wrote it. But, if FedEx must wait until the conclusion of the government's months-long case before calling such witnesses, the Court and the jury will be faced with a situation in which numerous emails are presented and discussed at least twice, months apart. Such a result would be inefficient, confusing and time-consuming.

FedEx proposes that the Court enter an order that streamlines the presentation of evidence under its wide discretion to control the order of proof. See *Geders v. United States*, 425 U.S. 80, 86 (1976); *United States v. Turner*, 528 F.2d 143, 162 (9th Cir. 1975); *United States v. Martinez-Villanueva*, 463 F.2d 1336, 1337 (9th Cir. 1972). Under the proposed order, the government would be required to give the defense one week notice of its intent to introduce an out-of-court statement under Rule 801(d)(2)(D) or (E). If the author of the statement is a current or former FedEx employee and FedEx is able to produce him or her, then FedEx would produce the witness for examination by both sides at a time specified by the Government, or FedEx would instead stipulate to the foundation for admission of the out-of-court statement, reserving objections only as to privilege, relevance or undue prejudice. FedEx expects that such an order will save substantial trial time by reducing the need to address some documents two separate

1 times, and would promote fairness and the search for the truth. See Fed. R. Evid.
2 611(a) ("The court should exercise reasonable control over the mode and order of
3 examining witnesses and presenting evidence so as to: (1) make those procedures
4 effective for determining the truth; (2) avoid wasting time; and (3) protect witnesses from
5 harassment or undue embarrassment.").

6 **N. Jury Questionnaire, Voir Dire, and Jury Instructions**

7 **1. Jury Questionnaire**

8 FedEx requests that the Court ask prospective jurors to complete a jury
9 questionnaire.

10 On May 5, 2016, counsel for the defense sent a proposed questionnaire to the
11 prosecution; this morning, the prosecution responded with proposed changes and other
12 suggestions. The parties conferred earlier this afternoon. FedEx is hopeful that the
13 parties will be able to present the Court with a jointly-recommended questionnaire,
14 perhaps with a few outstanding issues to be resolved by the Court, before the pretrial
15 conference is held on May 19, 2016.

16 **2. Voir Dire Questioning**

17 FedEx requests that the parties be permitted to conduct attorney voir dire of
18 prospective jurors.

19 Some prospective jurors may have personal experiences, or relationships with
20 people who have personal experiences, with abuse of or addiction to prescription
21 medications, alcohol or other drugs. FedEx requests that such prospective jurors be
22 permitted to discuss their experiences with the Court and parties in a private setting.

23 **3. Jury Instructions**

24 FedEx will request jury instructions at the appropriate time as the trial concludes.
25 FedEx believes that certain instructions and legal issues should be resolved by the
26 Court before trial:

1 a. *Instruction about the Crime of Illegal Distribution of a*
2 *Prescription Medication*

3 In Defense Motion In Limine #1, we requested that the Court give a pretrial
4 instruction defining the crime of illegal distribution of a prescription medication. See Dkt.
5 241 at 1-2. In our Reply in Support of the FedEx Defendants' Motions In Limine, filed
6 contemporaneously herewith, we propose an amended instruction. The Court should
7 give Proposed Pretrial Instruction #1, attached hereto in Exhibit A, during its preliminary
8 instructions to the jury.

9 b. *Common Carrier Exemptions*

10 The parties have extensively briefed the application of the exemptions enshrined
11 in 21 U.S.C. §§ 373(a) and 822(c)(2). See, e.g., Dkt. 260 at 4-10. Nonetheless, the
12 Court has not yet determined the proper instructions to provide the jury concerning
13 these statutory defenses. FedEx requests that the Court give Proposed Instructions
14 #2(a) and 2(b) in attached in Exhibit A hereto.

15 c. *Privileged Communications*

16 In Defense Motion In Limine #17, FedEx proposed that the Court give an
17 instruction concerning the attorney-client privilege at an appropriate point during the
18 trial. See Dkt. 241 at 72-75. The Court should give Proposed Instruction #3, attached
19 hereto in Exhibit A.

20 d. *Corporate Mens Rea*

21 On February 26, 2016, FedEx filed a motion to dismiss the superseding
22 indictment due to errors in the grand jury proceedings. See Dkt. 208 (sealed); Dkt. 221
23 (public/redacted version). That motion demonstrated that the government may not
24 establish a corporation's knowledge or specific intent pursuant to a "collective scienter"
25 or "aggregation" theory. Dkt. 208 at 6-11. Although the Court denied the motion, it did
26 not ultimately determine whether a "collective knowledge" or "collective intent"
27 instruction would be appropriately given at trial. See Dkt. 246. For the reasons set forth
28 in FedEx's motion to dismiss, the Court should not issue instructions that would permit

1 the trial jury to employ "collective knowledge" or "collective intent" theories of liability.
2

3 Dated: May 12, 2016
4

5 Respectfully submitted,

6 ARGUEDAS, CASSMAN & HEADLEY, LLP
7

8 By: _____ /s/
9

10 Raphael M. Goldman
11 803 Hearst Avenue
12 Berkeley, CA 94710
13 (510) 845-3000
14

15 Counsel for Federal Express
16 Corporation, FedEx Corporation and
17 FedEx Corporate Services, Inc.
18